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Supreme Court, U.S.
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No. 08-275 AUG 27 2008

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In The

Supreme Court of the United States

KIT LEE,

Petitioner,

v.

HUNTLEIGH HEALTHCARE, L.L.C., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 70 FEP 486, 56 F. 3d 542, *reversed* (1996) should be overruled. Whether the U.S. Equal Employment Opportunity Commission Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) should be updated.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were Defendants in the courts below and are respondents in this Court:

Huntleigh HealthCare LLC:

Joyce Nunziata, Elizabeth A. Daly, Geralyn A. Boocher

Division on Civil Rights of New Jersey:

J. Frank Vespa-PapaLeo, Brian O. Lipman, Gary LaCassio, Anna Gilgram

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kit Lee respectfully petitions for a writ of certiorari to review the opinion and judgment of the New Jersey Supreme Court of Appeals for New Jersey of the Division on Civil Rights which decision against the State law (LAD), Federal law (ADEA), the interest of the congress to protect "older workers," also conflicts with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

OPINIONS BELOW

The Opinion of New Jersey Superior Court of Appeals for the Division on Civil Rights is not officially reported and is reproduced in Appendix at 1-8.

The Final Order of New Jersey Division on Civil Rights, dated July 10, 2006 is not reported. It is reproduced in the Appendix at 12-17.

The Order of New Jersey Supreme Court of Appeals for the Division on Civil Rights, dated May 30, 2008, denying Petitioner's Petition for Rehearing En Banc, is not reported. It is reproduced in the Appendix at 18.

JURISDICTION

The judgment of the Division on Civil Rights of appeals was entered on July 10, 2006. An appeal for review en banc was denied on December 10, 2007 by the Superior Court Appellate Division, duly presented the case to New Jersey Supreme Court for the Petition of Certification which was denied with silent. This Petition is timely under 28 U.S.C. §§1254(1), 2101(c), and Supreme Court Rule 13.3.

STATUTORY PROVISIONS INVOLVED

This case involves a decision of violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-4, discriminatory discharge was solely based on her age and national origin and, N.J.S.A. 10:5-12(a). The Court of Appeals had jurisdiction to review the final judgment of the Division pursuant to Rule 78 of the Federal Rules of Civil Procedure and was denied. The decision of the Division is inconsistent with the state law LAD, and federal laws: ADEA (1967) as much Title VII. Relevant provisions of the LAD, ADEA, and Title VII standards are reprinted in the Appendix at 19-App. 25, respectively.

STATEMENT OF THE CASE

Petitioner, Kit Lee ("Lee") was approved ten days vacation for her Alaskan cruise by supervisor, Glen Chambers from June 20, 2005 to July 1, 2005; she should be back to work on July 5, 2005. Upon returning to work she got a termination on July 1, 2005, and effective on 6/27/05, Lee spoke to the former co-worker Suiki, she was on her no paid leave until 8/13/05. Lee found that she got a recall back to work by supervisor, Glen Chambers on 5/19/05, and Suiki requested one more year-no-pay leave (365 days) was granted, on that date. Lee got fired because her 3-Paid-Day-Off (PDO) was denied during her vacation. Lee applied the 3-PDO since 1/13/05. Applications were submitted on 6/9/05 and approved on 6/10/05 before she left for vacation on 6/20/05. If the 3-PDO denied, she must get a return within two-days after the submission; further more even denied the approved 3-PDO, according to the employee's handbook she only subjected to unpaid not termination. Both Suiki and Lee are good workers, all the manufacturing department recognized that, Lee was singled out solely on age. Suiki is 36-years-old, Indian; Lee is a Chinese, age 56-years-old. And found that Respondent hired a replacement, Ms. Hannah Lao, a Filipino, aged 33 to fill up her position since September 26, 2005. Lee also found the Respondent dismissed two *Chinese* co-workers Ms. May Eng (age: 62) and Mr. Joe Eng (age: 65) on November 19, 2003, same reason because of age and national origin discrimination without full training twelve weeks dismissing

with a pretext. Lee filed a verified complaint of age and national origin discrimination in violation of the New Jersey Law Against Discrimination (LAD) with the Division on Civil Rights.

I. Factual Background

Huntleigh HealthCare LLC, ("Respondent") provides distribution, clinical support, and services for healthcare products for the United States. Respondent operates a facility in Eatontown Monmouth County, New Jersey. Petitioner, Kit Lee ("Lee") was hired as production operator, started at work on September 2, 2003. She was discharged on July 1, 2005, during her pre-approved vacation, effective on June 27, 2005. (App. 4)

Oral admitted 3-paid-day-off on 1/13/05

In January 2005, Petitioner planned a ten-day cruise to Alaska; she figured out in June, she only got accrued seven days for vacation. She talked to supervisor; Glen Chambers if she could take 3 no paid leave. Mr. Chambers offered she could have 3-paid-day-off (PDO); it is therefore she got ten days vacation.[evidence – Glen's worksheet chart]

Supposed back to work on 7/5/05

She submitted her request application for vacation on June 9, 2005. The request consisted of two

forms: the first, the accrued seven days from June 20 through June 28, 2005, and the second for borrowing 3-PDO, June 29, June 30, and July 1, 2005. Both of them were approved on June 10, 2005. Petitioner checked with Mr. Chambers on June 13, 2005 and double checked with Mr. Chris Belle both forms were alright on the last working day. Therefore she left for her ten days cruise. She supposed back to work on July 5, 2005, but no return. (App. 4)

Termination with a letter effective on 6/27/05

Upon returning to work she got a termination on 7/1/05 and effective on 6/27/05. She talked to supervisor, Mr. Chambers he said no clue about the termination and forwarded Lee to talk to the Human Resources Manager, Ms. Joyce Nunziata. Lee was told because the 3-PDO was denied. She must back to work on 6/29/05, that is, she violated Respondent's vacation policy. (App. 3-n1)

Questions rose up for Respondent:

1. Lee requested the 3 no pay leave since she planned her ten days cruise on 1/13/05, and supervisor verbally admitted to have that 3-paid-day-off in June and company allowed to borrow 3 PDO only apply before hand with supervisor. (App. 3, 3-n1, 4-n2)

2. She submitted two applications for leave on June 9, 2005. Her last physical working day was June 17, 2005, totaling 9 days, if the second form was

insufficient she must got return before she left. If insufficient the supervisor will return shortly within two days this is company's policy. (App. 4, para.1)

3. She checked with Glen Chambers on 6/13/05, both two forms were approved on 6/10/05. And on the last working day June 17, 2005, she double checked with Chris Belle, both forms are good, and then she left for her 10 days cruise. (App. 3-n1, 4-n2)

4. Moreover, employee's handbook clearly states that "unavailable vacation time is to be considered unpaid leave and that disciplinary action for unpaid leave are as follows: First incident – Written warning with discipline leading to probation. Second incident – 90 day probation leading to termination. Third incident – termination." As this was appellant's first incident she should have been only unpaid or warned, not terminated. (App. 3-4) It must have "a why" behind.

5. *Denying Benefits* –

   (i) Lee has no way to turn she sought unemployment benefit which was admitted on July 10, 2005. Respondent bounced her out from the benefits the pretexts: (a) Voluntary Leave (b) Misconduct absent from work. Following by a Hearing, Lee revealed the second form was destroyed. (Appeals Examiner Ms. Nancy Hunt proved that) Result 6 weeks no benefit. And Lee found why terminate effective on *6/27/05*. (App. 2-3). Respondent wants to establish a voluntary leave case without unemployment benefits. (App. 5-n4)

(ii) More violated employment action – Forfeit all approved vacation requests, including the first and second applications for denying paying, accused Lee did not submit the applications within two weeks, only 9 days to holding her last pay check since 7/8/05. Lee filed a complaint to Wage and Hour Compliance Board, Respondent prayed for favor (App. 3-4) denying and holding wages. But violated the New Jersey Wage Payment Law, penalty $100 or $250 per day from the date holding or put in jail 90 days or both. Respondent went through the law! (App. 5-n3, n4)

Real Reason was found – Ageism and National Origin

Lee spoke to the former co-worker Suiki, she is age: 36, Indian lady, she was on her no paid leave until 8/13/05. Suiki got a recall back to work by supervisor, Glen Chambers on 5/19/05, and Suiki requested one more year-no-pay leave (totaling 730 days, no health problem, no pregnant) was granted, on that date. (App. 12) Suiki started at work with Lee on the same date 9/2/03, she took her no paid leave on 8/13/04, less a year service with the company, she is ineligible to take no-paid-leave, but she got it. Again she was granted one more year from 8/13/05 to 8/13/06 (365 days), most favor to young ones; *Oxman v. WLS-TV*, 846 F. 2d 448, 455 (7th Cir. 1988), Suiki was back to work on 9/20/06. Lee got fired because her 3-PDO, was denied. Lee applied the 3-PDO since

1/13/05. Applications were approved on 6/10/05 before she left for vacation on 6/20/05. If the 3-PDO denied, she must get a return within 2-days after the submission, that is company's rule; if, even denied the approved 3-PDO, according to the employee's handbook she only subjected to unpaid not termination, to recall Suiki back to work and single out Lee, too harsh to older one, it is prohibited under the LAD. Suiki is 36-years-old. She revealed two Chinese older worker, May Eng (age: 62) and Joe Eng (age: 65) were fired on 11/19/03. (Suiki, May, and Joe – those evidences were eliminated from the Final Order – see App. 12-17)

Lee found her replacement outsider inexperienced age: 33

After three months of her termination, Lee found Respondent hired Ms. Hannah Lao, a Filipino, aged 33 to fill up her position on September 26, 2005. And found the Respondent dismissed two Chinese co-workers Ms. May Eng (age: 62) and Mr. Joe Eng (age: 65) on November 19, 2003, because of age and national origin without full training twelve weeks dismissing, only given four weeks. May Eng and Joe Eng were hired on 10/20/03 and fired on 11/19/03. Lee filed a complaint with the Division on Civil Rights ("The Division").

II. Proceedings In Division on Civil Rights

(A) Lee filed a verified complaint of age[1] and national origin[2] discrimination in violation of the New Jersey Law Against Discrimination (LAD) with the Division, Lee, Chinese, 56-years-old, she was showing of satisfactory performance, when she got termination during her pre-approved vacation with a pretext. Respondent sought others to perform her work. Unequal treatment based upon age is governed by both New Jersey Law Against Discrimination (LAD) and Federal Law, Age Discrimination of Employment Act 1967 (ADEA).

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[1] Under the LAD/ADEA the employee bears the initial burden of proof to show either or showing that she belongs to protected classes (age: 40 or older) was qualified and performing well, was discharged though qualified and working well, and a significantly younger person was replaced or retained or treated more favorably.

[2] National Origin is the same requirement, only must belong to minority group (race /national origin), was qualified and performing well, was discharged though working well, and a significantly younger person was retained or treated more favorably. National Origin Discrimination; [Code of Federal Regulations] [Title 29, Volume 4] [Revised as of July 1, 2003] From the U.S. Government Printing Office via GPO Access [CITE:29CFR1606.1-5] [Page196-198] [TITLE 29 – LABOR – COMMISSION] PART 1606 – GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN – In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

(B) Respondent filed an answer to respond to the allegations of the Verified Complaint on, admitted all allegations, including the job still open, it continued to hire Production Operators following the termination of complainant's employment. And denied only the age and national origin discrimination on Lee. [Respondent's formal answer.]

(C) Lee rebutted Respondent's Answer to submit two more disparate treatments after the termination, and a prima facie case: i.e. Holding payments and Opposed her unemployment benefit by destroying her approved vacation form, and if Lee was age 36-years old, no termination because the supervisor recalled Suiki back to work, she requested one more years no pay leave totally: 730 no-paid-off. She retained to work later (evidence I) – most favor to the young ones. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

(D) Since her replacement started at work, Lee established a prima facie case that Title VII's McDonnell Douglas framework for discrimination (evidence II), the intentional discrimination has been shown.

(i) Lee, a fifty-six-year-old, Chinese woman belongs to protected groups. [verified complaint]

(ii) She was good at work rating 2.2 satisfactory performances/exceeds Expectations, evaluator: supervisor, Glen Chambers on 4/29/05. [evaluated report]

(iii) She got termination on July 1, 2005. [Termination Letter]

(iv) Respondent hired a thirty-three-year-old, Filipino, outsider, Ms. Hannah Lao to replace her on 9/26/05. [Hired list after the termination/Suiki returns to work]

The Division adjourned the Fact Finding Conference on February 1, 2006, no transmit the case to the Office of Administrative Law (OAL) for a hearing, no the Administrative Law Judge (ALJ) touch the case. Lee was notified case closed on July 10, 2006, finding no probable cause. See at App. 12-17. That is NJ Supreme Court's question, no TCA, TCJ, and ALJ. Because Lee demonstrates the Respondent did not treat age neutrally in discharging her.

III. Proceedings In the Court of Appeals

NJ Superior Court points out the Law was violated. On appeal, plaintiff raises the following points:

POINT I

Claimant, would not have left if she had known that 3-PDO would not have granted. (App. 6). Lee is fifty-six year old Chinese woman, filed a verified complaint with the New Jersey Division on Civil Rights alleging that Respondent unlawfully discriminated against her on the basis of her age and national origin in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Since her replacement was a thirty-three-year-old, Filipino, Ms. Hannah Lao

to fill up her job. (App. 2) The prima facie case was established. The 3-PDO is a pretext, unlawful discharge violated the LAD. (N.J.S.A. 10:5-1)

POINT II

First incident was not subjected to termination. Lee filed a claim for Unemployment Benefit, she initially found eligible for benefits. Respondent appealed and the Appeal Tribunal found claimant ineligible for six weeks from date of discharge for "misconduct connected with the work." The Board of Review upheld the appeal Tribunal's determination – because her second request form was destroyed, Respondent violated the LAD, N.J.S.A. 10:5-1 *et seq.*, unlawful employment practice. (App. 5-n4, 6)

POINT III

Denying Benefit – Holding payment – Violated Wage Payment In addition to Lee complaint with DCR, she filed a complaint with the wage and Hour Compliance Board – Respondent prayed for favor refusing to pay the holding payment the complaint was resolved against Lee. "That resolution is not the subject of this appeal but the dispositive of claimant's argument Holding Payment that Respondent violated the NJ Wage Payment Law. N.J.S.A. 34:11-4.3." (App. 5-n3)

Law (N.J.S.A. 34:11-4.1) (N.J.S.A. 34:11-4.2)

(*N.J.S.A. 34:11-4.3 – The last pay check*)

Whenever an employer discharges an employee, or when the work of an employee is suspended as a result of a labor dispute, or when an employee

for any reason whatsoever is laid off, or whenever an employee quits, resigns, or leaves employment for any reason, the employer shall pay the employee all wages due not later than the regular payday. (She was terminated on 7/1/05. The regular payment should have been on July 8, 2005.)

N.J.S.A. 34:11-4.4 – Withhold or divert wages

"No employer may withhold or divert any portion of an employee's wages." Id. unless:

(a) The employer is required or empowered to do so by New Jersey or United States law; or (b) The amounts withheld or diverted . . .

N.J.S.A. 34:11-4.8 – Dispute over amount of wages

"In case of a dispute over the amount of wages, the employer shall pay, without condition and within the time set by this act, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies to which he might otherwise be entitled, including those provided under this act, as to any balance claimed." Id.

POINT IV

Final Order was issued not adequately, under *R.*4-32:1 – From the Prima Facie Case to *R.*4-51 – Final Decision of the Director; and the regulations (N.J.A.C. 13:4-1.1 to – 13.4).Must be reversed. For examples, Fraud: "The finding of No Probable Cause" to eliminate the replacement age: 33, and retained worker age: 36 of the prima facie cases in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 86 L. Ed. 2d 668 (1973), where the plaintiff is able to

establish direct evidence of discrimination and to eliminate Respondent violated the LAD, N.J.S.A. 10:5-12(a) unlawful employment practice to holding payments, unemployment benefit, and final pay check, bonus, and increment also violated the N.J. Wage and Payment Law, the resolution is not the subject but dispositive the issues to grant the favor to the Respondent the Major Laws of Discrimination did not respect. [App. 3, 5-n3 to n4] Therefore, the Court of Appeals held that "The Director did not abuse his discretion in determining that she presented insufficient evidence to establish probable cause." Id. (App. 7)

The Court of Appeals final decision:

On November 26, 2007, Lee filed a motion before Part D – Final Order, See App. 10, and Motion No. M-001885-07, The Appellate Division, did not review the entirely record, the evidence of the prima facie case of ageism was eliminated, i.e. the replacement age: 33 and the age: 36 co-work retained to work, and the discovery file of two Chinese workers were dismissed on 11/19/03, because of ageism and racism.

Before: The Appellate Division claimed "[C]ourts are not free to substitute their judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable . . . " Id. (App. 6-7)

After the Motion to Appellate Division, Lee pointed out the ageism and national origin discrimination prima facie cases and Respondent has had a

precedent case for ageism were eliminated from the finding of no probable cause. The Court of Appeals reasoned that the congressional purpose in enacting the ADEA was to "address the problems faced by older workers" by giving them a remedy for the discrimination they faced, the Court of Appeals denied the motions presented the case to the U.S. Supreme Court, because the Court of Appeals believes that:

> "When a fifty-six-year-old, production operator was termination with a pretext during her pre-approved vacation leave. A 36-year-old former co-worker recalled back to work, and hired 33-year-old replacement to fill up her position. And she found the Respondent has had the precedent in ageism, did not give full training to two former co-worker age 62, and 65 to fire them based on ageism and racism, moreover denying older worker's benefits by holding her wages and destroying approved evidence to hold her unemployment benefit; those prohibits by the LAD and ADEA as well the Title VII"

Should be survived with a judgment "EQUAL JUSTICE UNDER LAW" therefore presented the case to this Court to petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Order of the Division on Civil Rights is in Conflict with LAD.

An employee bringing a claim under New Jersey's Law Against Discrimination (LAD) can show that the employer's articulated reason for adverse employment action was merely a pretext to mask the discrimination by showing that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence. N.J.S.A. 10:5-12 (a).

The Supreme Court suggested in order to prove pretext, the plaintiff must show that the defendant's reasons were false and that discrimination was the real reason, however, in terms of the prima facie case and burden-shifting as in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 86 L. Ed. 2d 668 (1973), where the plaintiff is able to establish direct evidence of discrimination (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Id. at 802. As the Court noted, "[t]he facts will vary in Title VII cases, and the specification above of the prima facie proof required from Respondent is not necessarily applicable in every

respect to differing factual situations." Id. at 802 n.13.

(i) Lee, a fifty-six-year-old, Chinese woman belongs to protected group/minority group.

(ii) She was good at work rating 2.2 satisfactory performances/exceeds Expectations, evaluator, supervisor, Mr. Glen Chambers. [Evidence – evaluated appraisal report on 4/29/05].

(iii) She got termination on July 1, 2005. [Evidence – termination letter]

(iv) Respondent hired an inexperience thirty-three-year-old, Filipino-outsider, Ms. Hannah Lao to replace her since September 26, 2005.

Lee established each of the four prongs as so articulated. *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983). Her case was dismissed with prejudice. That can have a strong argument that Western Electric in terms permits the Title VII plaintiff to establish the fourth McDonnell-Douglas prong by merely showing that workers not in the protected class were retained during a reduction in force. Another evidence, Lee's co-worker, Suiki age: 36, retained to work, she got benefit increment before her no paid leave a year, on that time she is not available to take no pay leave, because less a year service. And she got recalled during her no pay vacation based on age, Lee got the termination with a pretext; the employer did not treat age neutrally. See

EEOC v. Clay Printing Co., 955 F.2d 936, 943 (4th Cir. 1992).

> If the Court determines that the plaintiff has offered evidence sufficient to establish a prima facie case as above, and [i]f the defendant has articulated a legitimate, non-discriminatory reason for its action, the defendant may still move for judgment under the LAD, *R.* 4:40-1 on the ground that the plaintiff has not offered sufficient evidence on the third stage of the McDonnell Douglas test.

After Lee offered the evidence with the fourth prong no disputable apply in McDonnell Douglas framework. First, the replacement, is age: 33, later the retained co-worker is 36 years old. In the third stage, Lee submitted the Respondent violated in other Statutes by Holding her wage refused to pay, $2397.55 violated the N.J. Wage Payment Law N.J.S.A. 34:11-4.3, as much as the LAD, and denying her unemployment benefit to destroy her approved application, singled her out no unemployment benefit six weeks, unlawful employment practice again, violated N.J.S.A. 10:5-12(a), moreover Lee found the Respondent double out, two Chinese older worker, May Eng age 62, Joe Eng age 65, the Respondent did not respond, if the Respondent kept silent during the discovery stage, the judgment must enter to the Petitioner.

And [I]f Lee failed to show evidence in the third stage, under the LAD, *R.* 4:40-1 that is, the reason of

"violating company's vacation policy" proffered by the employer was turned to a "pretext" and that the true reason for the rejection employment decision was unlawful discrimination. Lee is merit for the Cause under the State Law, LAD. The Decision was conflict the LAD. An adverse impact based on age may be tolerated or got no job. This Court must help to absent any discriminatory intent with "Petition for A Writ of Certiorari" or older employees are continuing moving out of the labor market.

II. The Review Below Is Inconsistent with Decisions of this Court

In addition to creating a conflict with numerous decisions of the courts, the Division's decision in this case is inconsistent with this Court's precedent in *O'Connor v. Consolidated Coin Caterers Corp.*, 70 FEP 486, 56 F. 3d 542, *reversed* (1996.) For this reason as well, plenary review is warranted.[3]

The decision below cannot be reconciled with the test adopted in *O'Connor*. If, as the *O'Connor* Court held, an ADEA plaintiff cannot even make out a prima facie case absent proof that the preferred employee was "substantially younger" than the plaintiff, it

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[3] The U.S. Equal Employment Opportunity Commission Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996). – Also, [EEOC NOTICE #915.002 dated: 9/18/96 By Gilbert F. Casellas, Chairman] http://www.eeoc.gov/policy/docs/oconnor.html.

necessarily follows that the ADEA does not proscribe employer policies that favor older workers over those "substantially younger." That this Court reviewed and favor to O'Connor merits.

The decision below also runs counter to the reasoning adopted by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In that case, this Court explained that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing "older workers" to be deprived of opportunities for employment, and that the "very essence of age discrimination" prohibited by ADEA is "for an older employee to be fired because the employer believes that productivity and competence decline with old age." Id. at 610. As the *Hazen Paper* Court took pains to reiterate, the ADEA encapsulates Congress's recognition that age discrimination, unlike other forms of disparate treatment such as race and sex discrimination, largely stems not from "animus" but from "stereotypes unsupported by objective fact" about the continued ability of "older workers." Id. at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)) (internal quotation marks omitted). Thus, the "prohibited stereotype[s]" that the ADEA seeks to eliminate are those that are adverse to "[o]lder employees." Id. at 612. Accordingly, when employers instead extend more favorable treatment to "older workers," the problem addressed by Congress in the ADEA is simply not present. Conflicts with the precedent with this Court's

Decision in 1996 *O'Connor v. Consolidated Coin Caterers,* 70 FEP 486, 56 F. 3d 542, *reversed.*

- The Court of Appeals for the Fourth Circuit stated that petitioner, age 56, O'Connor could establish a prima facie case under McDonnell Douglas framework only if he could prove that (1) he was in the age group protected by the ADEA; (2) he was discharged; (3) at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations; (4) following his discharge, he was replaced by someone of comparable qualifications outside the protected class. Since O'Connor's replacement was 40 years old, the Court of Appeals concluded that the last element of the prima facie case had not been made out.

- In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in McDonnell Douglas, that application of the Title VII rule to the ADEA context is correct.

- The question presented for the determination is what elements must be shown in an ADEA case to establish the prima facie case that triggers the employer's burden of production. O'Connor's case, the replacement was aged 40, so limits the protected class to those who are 40 or older.

- But in the court's review rather in recognizing that the prima facie case requires "evidence adequate to create an inference that an employment decision

was based on an illegal discriminatory criterion . . . " While the Respondent's principle theoretically permits such thin evidence of the ADEA prohibits discrimination on the basis of age and not class membership, judgment of the Fourth Circuit is reversed, and the case is remanded.

- Comparable to O'Connor's case, Lee has direct evidences and circumstantial evidences, her replacement is 33-year-old, no disputable, all required by the ADEA, the LAD, and Title VII. O'Conner age: 56, his replacement 40, 16 years junior than O'Connor, this Court considers "While the Respondent's principle theoretically permits such thin evidence of the ADEA prohibits discrimination on the basis of age and not class membership, judgment of the Fourth Circuit is reversed, and the case is remanded."

- Lee is age 56, her replacement is age: 33 years old (no disputable for the fourth prong), junior 23 year, should be survived with "A Writ of Certiorari." Since *O'Connor* and *Hazen Paper* both teach that the ADEA seeks to remedy a specific "societal ill." Its primary aim is to eradicate outmoded stereotypes about older workers' proper place in the workforce.

- The Division's decision, see [App. 16-17] is strongly subverting the very purpose of the ADEA as explicated in this Court's opinions. Review is warranted to resolve this tension.

III. The Ruling Below Is Inconsistent With Congressional Purpose and Intent

The ADEA's statement of findings and purpose, opinion of the court §2 of the Act, provides in pertinent part:

> (a) The Congress hereby finds and declares that:
>
> (1) In the face rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) The setting of arbitrary age limits regardless of potential fro job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.
>
> (b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather then age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of

> meeting problems arising from the impact of age on employment.

The ADEA's nondiscrimination provision, 29 U.S.C. §621, §4(a) of the Act, provides in pertinent part:

> It shall be unlawful for an employer – "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' age . . . " Id.

The courts of appeals holding that "The Director did not abuse his discretion in determining that she presented insufficient evidence to establish probable cause" (see App. 7), to challenge with Congress's purpose in enacting the ADEA. As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Respondent did not treat age neutrally in discharging Lee since she established the fully credit ageism prima facie case. The statement of purpose that Congress wrote into the ADEA makes clear that it was intended to benefit older workers. The Division's decision is inconsistent which Congress passed the Act eliminates any possible doubt on this score. Consideration of each of these sources compels the conclusion that the Court of Appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA.

The congressional findings emphasize that the Act was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who face disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA §2(a)(1)-(3), 29 U.S.C. §621(a)(1)-(3); see *Hazen Paper*, 507 U.S. at 610; *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress found that those stereotypes led employers to set "arbitrary age limits," which "work to the disadvantage of older persons" who are seeking "to retain employment, and especially to regain employment when displaced from jobs." ADEA §2(a)(1)-(2), 29 U.S.C. §621(a)(1)-(2) (emphasis added); see *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985) ("[T]he policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions."). The result of these discriminatory practices was that long-term unemployment became, "relative to the younger ages, high among older workers."

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, see *EEOC v. Wyoming*, 460 U.S. at 230-31 (detailing the genesis and drafting of the Act), underscore the precision with which Congress focused on the disadvantages that older workers face "relative to the younger ages."

The Court of Appeals' contrary determination improperly ignores the structure and context of the statute as a whole and violates fundamental canons

of statutory construction adopted and repeatedly reaffirmed by this Court's decisions, i.e. *O'Connor* and *Hasen Paper*. After the motions, the Court of Appeals believes it could be survived with a judgment to grant "A petition for A Writ of Certiorari.

IV. The Question Presented Is An Important And Recurring One, And The Burdensome Impact Of The Decision Below Necessitates this Court's Review.

In *O'Connor*, this Court addressed the question whether an ADEA plaintiff's prima facie case must include proof that the employee who was preferred over the plaintiff was outside the protected age group.

It was sufficient for the plaintiff to establish that the replacement was "substantially younger than the plaintiff." *O'Connor*, 517 U.S. at 313. The Court premised its "substantially younger" test on the need for a "logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" Id. at 311-12 (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981)). In light of the underlying discrimination that the ADEA forbids and for which the ADEA prima facie case is intended to serve as a proxy, i.e., discrimination against older workers based on their relatively advanced years, in Lee's case, the question presented by this Petition should be reviewed and

resolved by this Court easily, the decision is inconsistent with all major discrimination law, i.e. the LAD, the ADEA, and Title VII.

1. Moreover, the decision below threatens to affect a dramatic shift in the conduct of ADEA litigation writ large. Review by this Court is necessary to eliminate the grave consequences produced by this decision.

2. The rule laid down by the Division's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation.

3. Review is warranted to forestall the burdensome effects unleashed by the Division's distortion of Congress's purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIT LEE
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August 27, 2008

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0088-06T5

KIT LEE,

Appellant,

v.

HUNTLEIGH HEALTHCARE, LLC,

Respondent.

Argued October 29, 2007 – Decided November 13, 2007

Before Judges Lintner and Sabatino.

On appeal from the New Jersey Division on Civil Rights, EN11WB-51812.

Kit Lee, appellant, argued the cause pro se.

Brian O. Lipman, Deputy Attorney General, argued the cause for respondent, New Jersey Division on Civil Rights (Anne Milgram, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Lipman, on the brief).

Elizabeth A. Daly argued the cause for respondent, Huntleigh Healthcare, LLC (Heim & Lamastra, attorneys; Geralyn A. Boccher, on the brief).

PER CURIAM

Claimant, Kit Lee, a fifty-six year old Chinese woman formerly employed as a Production Officer at Huntleigh Healthcare's (Healthcare) Eatontown plant, filed a verified complaint with the New Jersey Division on Civil Rights (Division), alleging that Healthcare unlawfully discriminated against her on the basis of her age and national origin in violation of the Law against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49. The Division's investigator compiled information from interviews with claimant, her supervisors at Healthcare, and several other similarly situated employees, all of whom confirmed Healthcare's policy against borrowing vacation time that has not accrued. The investigator found:

> In conclusion, [Healthcare] articulated a legitimate, non discriminatory, business related reason for its decision to discharge Complainant; that is Complainant violated [Healthcare's] vacation leave policy when she failed to return to work following her approved vacation leave. [Healthcare] supported its position with documented evidence, and the investigation further revealed those younger, non Chinese employees were discharged for the same reasons as Complainant. Complainant was unable to show that [Heathcare's] reason for her discharge was untrue or a pretext to discriminate against her for any unlawful reason, including national origin and age.
>
> . . . .

> Based on the investigation, it is recommended that this be closed, NO PROBABLE CAUSE.

On the basis of the investigation, the Director of the Division found that there was no probable cause to credit the allegations in claimant's complaint and ordered the file closed. We now affirm the Director's order.

Claimant began her employment with Healthcare on September 2, 2003. When she received notice that she was accepted for employment, Healthcare provided her with a copy of the employee handbook, which included guidelines for vacation time and potential disciplinary action for violations of company policy with regard to vacation time.

In January 2005, claimant orally requested ten days paid vacation, which she claimed was orally approved by her production manager, Glen Chambers, although she had only accrued seven days at the time of her request.[1] Thereafter, in February 2005, an e-mail reiterating the vacation time policy was forwarded by Human Resources to the entire company, indicating that if time has not accrued, a vacation will not be approved and failure to "work will result in disciplinary action, up to and including

---

[1] In his interview, Chambers denied orally approving claimant's request.

termination."[2] In March 2005, based upon the oral approval she claimed she received from her supervisor in January, claimant booked a ten-day Alaskan cruise scheduled for the last ten days of June 2005. However, claimant did not submit her written request for vacation time until June 9, 2005, just 11 days prior to her scheduled departure date for the cruise. The request consisted of two forms: the first, for seven days from June 20 through June 28, 2005, and the second for an advance of three days, June 29, June 30, and July 1, 2005. The first request was approved, but the second request was denied by Chambers. Chambers told claimant that if she did not report to work on June 29, 2005, she would be considered to have voluntarily resigned from her position.

On June 17, 2005, the last working day prior to her vacation, claimant spoke with Chris Belle, Director of Manufacturing, and request the three additional days. Belle advised claimant that she could not have the time off, and that if she did not return to work on June 29, it would be assumed that she had voluntarily resigned her employment.

Claimant took her vacation from June 20 through July 1, 2005. When she returned home, she received a letter dated July 1, 2005, terminating her employment effective June 27, 2005.

---

[2] Lee claims that, as a production operator, she did not have access to company e-mail, and therefore never received that message.

In addition to her complaint with the Division, claimant filed a complaint with the Wage and Hour Compliance Board,[3] as well as a claim for Unemployment.[4] The Division's investigator conducted a number of interviews, including one with claimant, as well as a thirty-six-year-old Caucasian man and a forty-two-year-old Filipino man who were fired for their first time failing to comply with Healthcare's vacation policy. In her interview, the claimant conceded that she believed she was fired because she requested a bonus and an increment, rather than because of her natural origin and age.

The investigator also interviewed a fifty-three-year-old Chinese man and his forty-nine-year-old wife who related that they both were denied non-accrued vacation time when requested. Similarly, three other employees, a forty-one-year-old Puerto Rican man, another Caucasian man, and a forty-five-year-old Cuban man indicated that their requests to borrow against future vacation time had been denied. Both Chambers and Belle were interviewed.

---

[3] Claimant's Wage and Hour Complaint was resolved against her in February 2006. That resolution is not the subject of this appeal but is dispositive of claimant's Point III argument that Healthcare violated the wage payment law, *N.J.S.A.* 34:11-4.3.

[4] Claimant was initially found eligible for benefits. Healthcare appealed and the Appeal Tribunal found claimant ineligible for six weeks from date of discharge for "misconduct connected with the work." The Board of Review upheld the Appeal Tribunal's determination.

On appeal, plaintiff raises the following points:

POINT I

APPELLANT WOULD NOT HAVE LEFT IF SHE HAS KNOWN THAT THE EXTRA THREE DAYS WOULD NOT BE GRANTED – UNLAWFUL DISCHARGE VIOLATION THE NEW JERSEY LAW AGAINST DISCRIMINATION (*N.J.S.A.* 10:5-1).

POINT II

FIRST INCIDENT WAS NOT SUBJECTED TO TERMINATION VIOLATION THE NEW JERSEY LAD (*N.J.S.A.* 10:5-1 ET SEQ.).

POINT III

VIOLATING N. J. WAGE PAYMENT LAW (*N.J.S.A.* 34:11-4.2) AND (*N.J.S.A.* 34:11-4.3).

POINT IV

FINAL ORDER ANALYSIS – IT WAS ISSUED NOT ADEQUATELY, UNDER *R.* 4-49:11, *R.* 4-50; *R.* 51; *R.* 4-4:54 [*N.J.A.C.* 13:4-1.1 to -13.4], MUST BE REVERSED.

Our independent review of the entire record mandates our agreement with the conclusions of the Director. If we find sufficient credible evidence in the record to support the agency's conclusions, we must uphold the decision. *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 587 (1988). "[C]ourts are not free to substitute their judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not

otherwise defective because arbitrary or unreasonable. . . . " *New Jersey Guild of Hearing Aid Dispensers v. Long,* 75 *N.J.* 544, 562-63 (1978). The Director's decision was not arbitrary, capricious, or unreasonable. Simply stated, claimant's proofs failed to establish that the reason articulated by Healthcare for her termination was a pretext for discrimination. *See Zive v. Stanley Roberts, Inc.,* 182 *N.J.* 436, 447-50 (2005).

Claimant's assertion on appeal that Healthcare failed to comply with wage and hour laws was not the subject matter of her civil rights complaint nor is it cognizable by the Division on Civil Rights. Moreover, claimant acknowledges that she unsuccessfully adjudicated that issue before the Division of Wage and Hour Compliance.

To be sure, claimant chose "the alternative administrative mechanism [of] filing the complaint with the Division on Civil Rights . . . availing [herself] of a means of redress normally swifter and less expensive than formal litigation." *Sprague v. Glassboro State College,* 161 *N.J. Super.* 218, 226 (App. Div. 1978). The Director did not abuse his discretion in determining that she presented insufficient evidence to establish probable cause. She was not entitled to a plenary hearing. *See Herman v. Fairleigh Dickinson University,* 183 *N.J. Super.* 500, 503-04 (App. Div.), *certif. denied,* 91 *N.J.* 573 (1982).

We are satisfied that claimant's arguments lack sufficient legal and factual merit to warrant further

discussion in a written opinion. *R.* 2:11-3(e)(1)(D) and (E).

Affirmed.

ORDER ON MOTION

KIT LEE
V
HUNTLEIGH HEALTHCARE

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -000088-06T5
MOTION NO. M -001885-07
BEFORE PART: D
JUDGE(S): LINTNER
SABATINO

MOTION FILED: NOVEMBER 26, 2007
BY: KIT LEE

ANSWER(S) FILED:

SUBMITTED TO COURT: DECEMBER 05, 2007

ORDER

(Filed Dec. 10, 2007)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 6 DAY OF December, 2007, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
– FOR RECONSIDERATION

GRANTED	DENIED	OTHER
( )	(X)	( )

SUPPLEMENTAL:
GPS EN11WB-51812

FOR THE COURT

/s/ John M. Chacko
JACK L. LINTNER
P.J.A.D.

JUMTM

SUPREME COURT OF NEW JERSEY
C-687 September Term 2007
62,084

KIT LEE,

Plaintiff-Petitioner

v.

HUNTLEIGH HEALTHCARE, LLC, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

(Filed Mar. 27, 2008)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-88-06 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 25th day of March, 2008.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. EN11WB-51812

KIT LEE	)	
Complainant,	)	
v.	)	**FINDING OF NO PROBABLE CAUSE**
HUNTLEIGH HEALTHCARE,	)	
Respondent.	)	

On SEPTEMBER 22, 2005, a verified complaint was filed in the above matter. An investigation of the allegations set forth in the complaint has been conducted. The results of that investigation having been evaluated, it is on this 10th day of July 2006, determined pursuant to *N.J.S.A.* 10:5-14 and *N.J.A.C.* 13:4-6.1(d) that there is no probable cause to credit the allegations of the complaint, and the file is, therefore, closed.

/s/ J. Frank Vespa-Papaleo
J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR

FINDINGS OF INVESTIGATION

KIT LEE V. HUNTLEIGH HEALTHCARE
DOCKET NO.: EN11WB-51812-A
EEOC CHARGE NO.: 17EA600080

This matter arose on September 22, 2005, when Complainant filed a Verified Complaint against Respondent in which she alleged that she was discriminated against, in violation of *N.J.S.A.* 10:5-12(a) of the New Jersey Law Against Discrimination.

SUMMARY OF COMPLAINT:

Complainant alleged that she was discharged from her position as production operator because of her age (56) and national origin (Chinese). To support her claim, Complainant alleged that Respondent's reason for her discharge – violating company policy – was untrue, in that she did not violate company policy, and was used to discriminate against her because of her age and national origin,

SUMMARY OF RESPONSE:

Respondent denied discriminating against Complainant for any unlawful reason including age or national origin. Respondent contended that Complainant was discharged because she violated its vacation time policy.

BACKGROUND:

Respondent provides distribution, clinical support, and services for healthcare products. Respondent operates a facility in Eatontown, Monmouth County, New Jersey.

Complainant was hired as production operator on September 2, 2003. Complainant was discharged on June 29, 2005.

SUMMARY OF INVESTIGATION:

The investigation supported Respondent's position. Specifically, Respondent's policy with respect to vacation leave states in part, *"If vacation time is not available, the difference will be unpaid. Any instances of unpaid time will result in disciplinary action up to and including termination."*

Further investigation revealed that Respondent's human resources generalist, Michele A. Kelly, circulated an e-mail to all employees in February 2005, reiterating Respondent's policy. The e-mail read as follows:

> *" . . . If you do not have the time accrued, your vacation will not be approved and you will be expected to be at work. Failure to report to work will result in disciplinary action, up to and including termination.* ***THERE WILL BE NO EXCEPTIONS!"***

The investigation revealed that on June 9, 2005, Complainant submitted two separate vacation request

forms to her supervisor, Glen Chambers; one for seven days, from June 20 through June 28, 2005, and another for three days, from June 29, through July 1, 2005. As of that date, however, Complainant only had seven available days. Complainant's request for three additional vacation days was, therefore, denied.

During an interview with the assigned investigator, Mr. Chambers stated that he approved Complainant's request for seven vacation days, but denied the additional three days.

Subsequently, Complainant asked Mr. Chambers supervisor, Christopher Bell, if he would approve her request for an additional three days vacation. Mr. Bell advised the investigator that he denied Complainant's request and advised her that if she did not return to work following her seven days approved vacation, she would be discharged.

There is no dispute that Complainant disregarded the above. Complainant left for vacation on June 20, 2005, and she did not return on June 29, 2005. Thus, Complainant was discharged in accordance with Respondent's policy.

Complainant's claim of national origin and age based discrimination was further weakened by circumstantial evidence. Specifically, the investigation revealed that two non-Chinese employees, Wayne Azarello (age 36) and Abelardo Sampson (age 42), were discharged for the same reason as Complainant. Mr. Azarello was discharged in February 2004, and Mr. Sampson in August 2004, when they failed to

return to work following their approved vacations. During an interview with the assigned investigator, Mr. Azarello confirmed that this was the first time he violated Respondent's vacation policy.

COMPLAINANT'S REBUTTAL:

Information obtained during the investigation was shared with Complainant. Complainant was offered the opportunity to rebut this information, but did not provide any addition evidence or information which refuted Respondent's position.

CONCLUSION:

In conclusion, Respondent articulated a legitimate, non discriminatory, business related reason for its decision to discharge Complainant; that is, Complainant violated Respondent's vacation leave policy when she failed to return to work following her approved vacation leave. Respondent supported its position with documented evidence, and the investigation further revealed that younger, non Chinese employees were discharged for the same reason as Complainant. Complainant was unable to show that Respondent's reason for her discharge was untrue or a pretext to discriminate against her for any unlawful reason, including national origin and age.

RECOMMENDATION:

Based on the investigation, it is recommended that this case be closed, NO PROBABLE CAUSE.

SUPREME COURT OF NEW JERSEY
M-1271 September Term 2007
62,084

KIT LEE,

Plaintiff-Movant,

v.

HUNTLEIGH HEALTHCARE, LLC, et al.,

Defendants.

ORDER

(Filed May 30, 2008)

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 28th day of May, 2008.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

Standard of proof under the State Law – NJLAD

(A.) State Law – New Jersey's Law Against Discrimination ("LAD") *N.J.S.A.* 10:5-1 to 12(a). It is important to recognize that even where federal law does not apply to protect employees, state and local law may provide similar protections.

(1) In pertinent part, provides that: "Prohibits an employer from subjecting an employee to hostile work environment, and disparate treatment, due to the employee's race, gender, age, national origin . . . also prohibits against an employee in the form of a hostile work environment, illegal discharge or other forms of adverse employment action such as unjustified disciplinary action . . . " *Id.*

(2) The employee must prove by a preponderance of the evidence that age was a determinative factor in the employment decision. It is not necessary under New Jersey law against discrimination that age be the sole motivating factor. If discrimination on the basis of age made the difference in the decision, then discrimination in violation of the statute has been established. In other words, Petitioner must prove that but for her age she would not have been discharged.

(3) As in this ageism case claims under: the LAD – *N.J.S.A.* 10:5-1 to -12(a).) Petitioner bears the initial burden to prove that the respondent claimed the "violating company's vacation policy" was a pretext for discrimination, or in order to establish a cause of action for discrimination under the LAD, plaintiff

> must show that age played a role in the decision making process and that it had a determinative influence on the outcome of that process *N.J.S.A.* 10:5-1 to -12(a).

In 1973, the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 created a three-part burden-shifting framework for resolving intentional discrimination suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). The first part of the framework requires the employee-plaintiff to establish a prima facie case, which consists of four elements. The plaintiff must show that she belongs to a protected group; Title VII recognizes race, age, gender and national origin distinctions. See 42 U.S.C. § 2000e (1988), that she applied and was qualified for an open position, that the employer rejected her application, and that the employer continued to seek applicants from persons of plaintiff's qualifications. See *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff succeeds in establishing her prima facie case, an inference of discrimination arises, and the burden of production shifts to the employer-defendant to come forward with a legitimate, nondiscriminatory reason for its actions. See 411 U.S. at 802. At the third stage, the plaintiff has a final opportunity to demonstrate that discriminatory animus, rather than the employer's proffered explanation, motivated the employer's actions. See 411 U.S. at 804.

A case involving allegations of age discrimination, the court has indicated, "To establish a prima

facie case of discrimination in situations where individuals have lost their positions, it has been stated that a Petitioner must show (1) that he belongs to a group protected by the statute; (2) that he was qualified for the job; (3) that he was terminated; and (4) that after his termination, the employer hired a person not in (P)etitioner's protected class or retained those having comparable or lessor qualifications not in the protected class."

Applying the test for establishing a prima facie case set out in *McDonnell Douglas* framework for Lee's age and national origin discrimination, (1) Petitioner, age: 56, Chinese, belongs to protected groups. (2) She was discharged on 7/1/05, effective on 6/27/05 (evidence – termination letter); (3) She was good at work rating 2.2 satisfactory performances/ exceed Expectations, evaluator: supervisor, Glen Chambers on 4/29/05. (Evidence – evaluated appraisal report from supervisor) (4) Respondent hired a thirty-three-year-old, Filipino-outsider, Ms Hannah Lao to replace her since September 26, 2005 (evidence – hired list after her termination) the Discrimination has been shown, and that would be unlawful under the LAD. *N.J.S.A.* 10:5-1 to -12(a).

Once an employee has established a prima facie case under the LAD, a presumption is created that the employer unlawfully discriminated against her; the burden then shifts to the employer to rebut presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, the reasons for the adverse action against

employee which would support a jury finding that unlawful discrimination was not the cause of the adverse action. *N.J.S.A.* 10:5-1 to -12(a).

Once an employer sets forth a legitimate, non-discriminatory reason for its adverse action against an employee, the burden shifts to the employee to show that the employer's articulated reason was merely a pretext to mask the discrimination, or that it was not the true motivating reason for the employer's action. *N.J.S.A.* 10:5-1 to -12(a).

An employee bringing a claim under the LAD can show that the employer's articulated reason for adverse employment action was merely a pretext to mask the discrimination by showing that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence. *N.J.S.A.* 10:5-1 to -12(a).

Under New Jersey law, as predicted by federal court, terminated employee bringing age discrimination claim under LAD must show that she was replaced by someone sufficiently younger so as to raise an inference of impermissible age discrimination. *N.J.S.A.* 10:5-1 to -12(a).

In the third stage after Lee offered the evidence with the fourth prong no disputable apply in *McDonnell Douglas* framework, her replacement, is Age: 33, [i]f Lee failed to show evidence in this stage, under the LAD, *R* 4:40-1 that is the reason proffered "Violating company's vacation policy" by the employer was turned to a "pretext" and that the true reason for the

adverse employment decision was unlawful discrimination. Lee is merit for the Cause under the state law LAD.

Federal laws Standard of proof under Ageism

(B.) The Age Discrimination Employment Act of 1967 (ADEA) 81 Stat. 602, is intended "to promote employment of older persons based on their ability rather than age" 29 U.S.C. § 621-634 of the ADEA – as the federal cause of action "it is the Petitioner's burden to prove, by a preponderance of the credible evidence, that her age was the sole motivating factor for the Employer's decision to terminate her employment." An employee subject to a RIF can prove a prima facie case under the *McDonnell Douglas*'s framework by showing:

(i) That he was within the protected age group (age 40 or over); (ii) That he was performing in accordance with the employer's legitimate expectations; (iii) that he was terminated; (iv) that others not in the protected class were treated more favorably. *Oxman v. WLS-TV, 846 F. 2d 448, 455 (7th Cir. 1988)*

Federal law Title VII Standard of proof under National Origin

(C.) Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) ("Title VII"), 42 U.S.C. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil

Rights Act of 1991 (Pub. L. 102-166) (CRA) Definitions §§ 2000e. – § *701*

UNLAWFUL EMPLOYMENT PRACTICES
§§ 2000e-2. § *703*

(a) It shall be an unlawful employment practice for an employer, in pertinent part, provides that: –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

As in Title VII cases, the employer must rebut a prima facie case by articulating a legitimate nondiscriminatory reason for its action. If the employer does so, the plaintiff must then demonstrate that the

employer's justification is a pretext in order to prevail.

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(2)

No. 08-275

Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KIT LEE,

Petitioner,

v.

HUNTLEIGH HEALTHCARE, L.L.C., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Respondents wasted precious judicial resources while are causing a less accurate, unlawful decision which was ironed out inconsistent with the major laws, New Jersey Law Against Discrimination (NJLAD), federal law, Age Discrimination in Employment Act (ADEA), Title VII Act, and conflict with huge of this Court's precedents. The Court of Appeals may not be affirmed the agency's unlawful decision by its request, "The reviewing court is obligated to affirm if there is any fair argument in support of the course taken by the agency." *Id.* The Court of Appeals must express a belief, based on reasoned and studied professional judgment, that this appeal involves a question of importance concerning the Congressional Purpose and Intent that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing older workers to be deprived of opportunities for employment, and that is the very essence of age discrimination. The ruling below is inconsistent which Congress passed; the ADEA eliminates any possible doubt on this score. The Petition for Rehearing should be granted.

STATEMENT OF THE CASE

The background: The Manufacturing Department was established in January 2002, started to make the health care products in August. It is fully operative since 2003 with two shifts, day-shift and

night shift; about a hundred production operators, Lee was hired in September 2003, she observed they are conscious in Manufacturing Dept. if you are over fifty years old, you must voluntary pick the Night-Shift, working hours from 5:30 pm to 2:30 am, especially Chinese or got hard time. If non-Chinese over fifty was allowed to stay at Day-Shift, the young ones could pick any shift for their interests, it is the unconscious bias, the average in age of Day Shift is 42; and average in age is 50.6 in Night Shift, that is replete with examples of stereotypical the older workers and unfavorable to them the treatment is discriminatory. After Petitioner's incident, respondent put more Chinese in day-shift.

Statement of the Fact: Lee was age 56, Chinese operator works at day-shift, during her pre-approved 10-day cruise, she got a termination, no return to work. Respondent recalled a 36-year-old, Indian co-worker back to work, and hired a 33-year-old, a Filipino to fill up her position, thereafter, five more inexperience operators were hired (Jasbir age: 29; Dioscaro age: 32, Medina age: 53; Carios age: 46; Nancy Yanet age: 32), the average in age: thirty-eight. All the evidences were in the records.

More findings: In discovery stages, to support her claim, Lee submitted more findings to the DCR that is the Respondent hired two Chinese operators on October 20, 2003; did not give full training twelve weeks to May Eng, age 62 and Joe Eng, age 65; to terminate, based on their age, on November 19, 2003, and their replacements are age: 39 Kaur Parveen,

Indian was born in 1965 – age: 39 – when she was hired on 1/5/04 to replace May Eng, Respondent erred to age: 44, and Vuong, Hoa Tu Vietnamese, age: 43 hired on 1/5/04 to replace Joe. Thereafter, totaling thirty-four operators were hired, average in age: 42-year-old. It has been proved by statistically with the hired list.

Petitioner relied on the four strands of evidences. These are set forth below, along with DCR's reasons for deciding that each was not probative of discrimination. *First*, Lee's replacement, Hannah Lao, a 33-year-old, Filipino as the first fourth element to fill up her position on September 26, 2005. *Second*, thereafter, her termination five more inexperience operators were hired: three 4th elements existed on October 24, 2005: Jasbir age: 29; Dioscaro age: 32, and Medina age: 53 (average age: 38). *Third*, two more 4th elements were hired on November 7, 2005: Carios age: 46; Nancy Yanet age: 32, the average in age: 37.5. *Fourth*, Lee relied on the evidence that she was treated less favorably than younger employees, i.e., Suiki, aged: 36-year-old, Indian, returned to work after two years, 730 days no-pay-leave, petitioner got no return, after her pre-approved 3-days. All evidences are in the record. Applying those findings, under the New Jersey Law Against Discrimination (NJLAD), it violated N.J.S.A. 10:5-4, N.J.S.A. 10:5-12(a).

Apply those findings to NJLAD, ADEA, and Title VII, the employee who feels he may have been discriminated against on the basis of age may appeal

to the Agency, who allows the employee to file in either the state or federal court system. As indicating by the Supreme Court to apply in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), created a three-part framework for resolving intentional discrimination suits brought under Title VII of the Civil Rights Act of 1964. The first part of the framework requires the employee to establish a prima facie case which consists of four elements to show either direct or circumstantial evidence that age was the determining factor in the discharge by showing that he is a member of a protected class (40 or older), was qualified and performing well, was discharged though qualified and working well, and a significantly younger person was retained or treated more favorably (*U.S. Supreme Court 1996 in O'Connor v. Consolidated Coin Caterers,* 70 FEP 486, *Oxman v. WLS-TV*, 46 FEP 1392 (7th Circuit); *Kapossy v. McGraw-Hill*, 70 FEP 752 (New Jersey); and *Tuck v. Henkel Corp.*, 59 FEP 1199 (4th Circuit). In this case, Petitioner, a 56-year-old operator with good working performance ratings was discharged during her pre-approved 10-day cruise, while the 33-year-old Ms. Hannah Lao, new hired Filipino with inexperience, to fill up her position, she can demonstrate a prima facie case of age discrimination since she is older than 40, was discharged though qualified and working well, and her replacement is inexperience to fill up her position. Thereafter, five more operators were hired average in age is thirty-eight, and another significantly younger person, aged 36, Suiki retained to work after two years no-pay-leave, to treat more

favorably. All evidences are in the record. The judge in *Castle v. Sangamo Weston,* 46 FEP 139 (11th Circuit), found that, where the employer stated several individuals were discharged for various reasons including business reorganization, personality conflicts, poor job performance, the individual presented enough substantial evidence for a reasonable person to conclude they were a pretext for age discrimination. The main issue is that employees not in the protected age group were treated more favorably ... the lay off decision, and that a determining factor in the decision was age and discussed that the third prong of the prima facie discrimination could be established by showing that the employee was replaced by a substantially younger employee with inferior qualifications. It is said the ADEA was violated.

If the Petitioner succeeds in establishing her prima facie case, an inference of discrimination arises, and the burden of production shifts to the employer-defendant to come forward with a legitimate, nondiscriminatory reason for its actions see *McDonnell Douglas*, 411 U.S. at 802. Employer failed to produce "any" evidence to suffices to meet the prima facie case, employer comes forward with Sampson and Wayne both of them violated company's vacation policy got fired did not relate with this ageism case, See: *Williams v. General Motors Corp.*, 26 FEP 1381 (5th Circuit); *Castle v. Sangamo Weston,* 46 FEP 139 (11th Circuit); *Montana v. First Fed. S&L Assn.*, 49 FEP 269 (2nd Circuit), and *Oxman v.*

WLS-TV, 46 FEP 1392 (7th Circuit). (All the company consolidation cases, those teach us the pretexts).

At the third stage, the petitioner has a final opportunity to demonstrate that discriminatory animus, rather than the employer's reason is untrue, the more findings to be relevant to showing the pretext, i.e., her 3-paid-day-off application was destroyed to create misconduct pretext of "violated company's vacation policy." It was proved by the Labor Department Appeal Examiner Ms. Nancy Hunt during the Hearing for appeal unemployment benefit on 9/9/05 (App. 5 n-3, n-4) as direct evidence for pretext proof. Besides, accorded to the six fourth-prongs those appear in her prima facie case of ageism that will hold the "true" for the reason of "violated company's vacation policy" is merely a "Pretext" as circumstantial evidence for pretextual reasons. Likewise, the Fifth Circuit found, in *Thornbrough v. Columbus & GRR Co.*, 37 FEP 1414 (5th Circuit) that where the 56-year-old employee discharged during a reduction in force was clearly better qualified than the retained younger employee, it could reasonably conclude that the employer's stated reasons for the discharge were pretext. Another example, in *Oxman v. WLS-TV,* 46 FEP 1392 (7th Circuit), found that where a 60-year-old news bureau manager was terminated during a reduction in force and was not considered for two other vacancies for which he was qualified while younger employees were selected for these, the employer's stated business reasons were pretext. Likewise, in *Montana v. First Fed. Sav. &*

Loan Assn., 49 FEP 269 (2nd Circuit), found that where the 56-year-old employee, qualified and highest paid, was terminated in a reduction in force and a younger co-worker retained, and the older not considered for available transfers for which she was qualified, the employer's actions violated the ADEA. Likewise under the NJLAD and Title VII were said to be violated.

NJLAD, ADEA and Title VII Act got no respect: The DCR held that the respondent only hired additional individuals into the position of production operators after the date of termination. See *Zive v. Stanley Roberts*, 182 N.J. 436, 446 (2005), and blurred that genuine issue of material fact exists for the fourth elements in her establishing prima facie cases of ageism and racism, i.e. petitioner's aged thirty-three replacement, and five more new hired inexperienced operators, average age thirty-eight years old for pretextual reasons, and eliminated the petitioner was less favorably because she was a Chinese, age 56 to compare with an Indian, age 36; that is, to have eliminated the pretext analysis, putting those all up front in the prima facie showing of ageism and racism to dismiss the case with a final order of "a finding No Probable Cause." The agency apprehends the respective state judicial system; "it is always advantageous to make the first move" to enter the judgment to employer.

During the discovery stage: a motion of reconsideration the decision to the DCR, Petitioner submitted more findings to support her ageism and national

origin discrimination case as a precedent occurring one and half years ago, the employer discharged two Chinese operators, May Eng, age 62, and Joe Eng age 65, and dismissed based upon their age and national origin on November 19, 2003, and their replacements are age: 39 and age: 43, thereafter, their rejection, totaling thirty-four operators were hired, average in age: 42-year-old. It has been proved statistically with the hired list after their termination. All the evidences were in the records. [T63, 63a-d] That evidence is during the discovery stage, and the employer did not respond, proof by DAG, Mr. Brian Lipman, during the discovery stage if the employer kept silent, no response the supporting evidence, the judgment must enter to Petitioner, the DCR did not admit the errors – against the major laws, and then petitioner has to run for the Appeal to the Superior Court Appellate Division.

The Court of Appeals correctly applies of all of the evidences concluding that petitioner proved a prima facie case, erred in holding that petitioner had not evidence proof in rebuttal by showing that its stated reason for a pretext. And the employer violated the New Jersey Wage Payment Law by holding payment – unlawful employment discrimination N.J.S.A. 10:5-12(a), likewise opposed her unemployment benefit by elimination the second application, it is prohibited by the LAD, and more finding in the two Chinese older co-workers were terminated as a precedent. If the Judge so finds, he must order a prompt and appropriate remedy. In the absence of such

findings, the judgment should be reversed and remanded to the petitioner. Based on those findings, the Court of Appeals to determine whether to overturn the decision.

Respondents of conducted the Court of Appeals: "The DCR's Finding of No Probable Cause is a final agency order. As such, the finding of No Probable Cause is appealable to this Court. *Prado v. State of New Jersey*, 186 N.J. 413, 422 (2006) (the Appellate Division is vested with exclusive jurisdiction over all final decisions of state administrative agencies). The scope of judicial review of a final agency order is limited. *In re Taylor*, 158 N.J. 644, 656 (1999) ... 'The agency's determination must not be overturned in the absence of showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies.' *E.g. Campbell v. Department of Civil Service*, 39 N.J. 556, 562 (1963)." *Id.* Then respondent of DCR continued: "It is not the function of the courts to substitute their independent judgment or the facts for that of an administrative agency. The Court will usually not review the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence or resolve conflicts therein. The reviewing court is obligated to affirm if there is any fair argument in support of the course taken by the agency...." *Id.*

"It is always advantageous to make the first move," the agency won. The Court of Appeals claimed: "[C]ourts are not free to substitute their

judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable...." *Id.* (App. 6-7) The Judge felt painful for the agency's professional advices. The Court of Appeals denied the motion presented the case to the Supreme Court of New Jersey. The Supreme Court duly submitted the case for this Court's action.

Under the New Jersey Law Against Discrimination the law said to be violated, in page eight as above. Petitioner testified her case in the federal judicial system, under ADEA and Title VII; employer was said to violate discriminatory discharge in ADEA. The Age Discrimination Employment Act is intended "to promote employment of older persons based on their ability rather than age." 29 U.S.C. §621(b). §623(a)(1) of the ADEA prohibits discrimination "against any individual ... because of such individual's age." Like Title VII legislation, it applies to individuals. The rule and the major laws, ADEA, LAD, Title VII Act, laid down by the agency's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation. Review is warranted to forestall the burdensome effects unleashed by the agency's distortion of Congress's purpose. This Court's mercy, this Court's commitment, the Petition for Rehearing should be granted.

THE REASON OF PETITION FOR REHEARING

No matter from what angle of the State Law, NJLAD, the Federal Laws, ADEA, and Title VII Act, this case was analyzed, everything kept circling back to the question that this appeal was involved – a question of importance concerning the Congressional Purpose and Intent that the Congressional findings emphasize that ADEA was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who face disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA §2(a)(1)-(3), 29 U.S.C. §621(a)(1)-(3); see *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Congress found that those stereotypes led employers to set "arbitrary age limits," which "work to the disadvantage of older persons" who are seeking "to retain employment, and especially to regain employment when displaced from jobs."

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, see *EEOC v. Wyoming*, 460 U.S. at 230-31, underscore the precision with which Congress focused on the disadvantages that older workers face "relative to the younger ages." The court of appeals is impossible to reconcile with Congress's purpose in enacting the Act to affirm the agency's discretion decision repeatedly, in this case, petitioner, age 56, was fired

and replaced by a 33-year-old replacement, five more operators were hired thereafter, average age thirty-eight, and retained age 36 co-worker.

Comparisons within this Court's precedent in *O'Connor v. Consolidated Coin Caterers,* 70 FEP 486, 56 F.3d 542, reversed (1996) O'Connor at age 56 was fired, filed his suit under the ADEA. The Fourth Circuit found he failed to make out a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792; because he failed to show that he was replaced by someone outside the protected age group by the ADEA, his replacement exactly is age 40. This Court observed: "The fact that one person in the PAG has lost out to another person in the PAG, so long as he has lost out because of his age;" "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion," 116 S.Ct. at 1310, *Teamsters v. United States*, 431 U.S. 324, 358 (1977), O'Connor's case was reversed and remanded.

Petitioner was made out an ageism case with fully credit without indisputable; her case was dismissed with a final order of finding no probable cause, the Court of Appeals claimed being not free to substitute the judgment of an agency....As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Thus, the statement of purpose that Congress wrote into the ADEA makes clear that it was

intended to benefit older workers. The legislative history and the backdrop against which Congress passed the Act eliminate any possible doubt on this score. Consideration of each of these sources compels the conclusion that the court of appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA. The Petition for Rehearing must be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant the Petition for Rehearing.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Pursuant to Rule 44(2), the undersigned hereby certifies that this Petition for Rehearing is brought in good faith and not interposed for the purpose of delay.

I herby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

_____

KIT LEE Pro Se as Attorney

Dated: November 26, 2008.